Supreme Court of the United States

No. 86.

THE ROYAL INSURANCE COMPANY,
Plaintiff in Error,

vs.

RUPERTO MARTIN, as Executor of the Will of FRANCISCO MARTIN, Deceased,
Defendant in Error.

Brief for Defendant in Error.

In his brief the counsel for plaintiff in error discusses three points or questions. Counsel for defendant in error will argue the negative of each such point. He will, therefore, attempt to establish the following three propositions:

1. This Court has no jurisdiction in this case.
2. The Court below did not err in its rulings with reference to the defense that the transfer of the personal property from Francisco Martin, the assured, to Martin Brothers voided the policy.
3. There was no error in the rulings of the Court below with reference to the ground of defense that the policy was void for the reason that the fire occurred during an invasion, riot, etc.

The corollary would be:

4. The writ of error should be dismissed for lack of jurisdiction, with costs to the defendant in error, or the judgment should be affirmed with costs to the defendant in error.

POINTS.

FIRST POINT.

This Court has no jurisdiction in this case.

This action was brought by the plaintiff, Ruperto Martin, a citizen of Porto Rico, against the Royal Insurance Company, a corporation organized under the laws of England. The declaration was filed February 21, 1902.

Jurisdiction was conferred upon the District Court of Porto Rico by the Act of April 12, 1900 (31 Stat. at L., 77), commonly known as the Foraker Act, "To provide revenues and a civil government for Porto Rico," and more particularly by Section 34 of that Act, which provides that "The district court for said district (of Porto Rico) * * * shall have in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit court of the United States, and shall proceed therein in the same manner as a circuit court."

This Act was amended March 2, 1901 (31 Stat. at L., 953) so as to "extend to and embrace controversies where the parties or either of them are citizens of the United States, or citizens or subjects of a foreign State or States, wherein the amount in dispute exceeds, exclusive of interest and costs, the sum or value of $1,000.00."

The declaration alleged a breach of contract of insurance, the non-payment of a loss covered by a policy issued by the defendant company. No question relating to the Constitution, treaties, or laws of the United States, or any other distinctly Federal question was involved in the controversy.

Judgment was rendered by the Court, upon the verdict of a jury, in favor of the plaintiff below for the sum of $7,623.00.

The Act of April 12, 1900, above referred to, by Section 35, provided further:

"That writs of error and appeals from the final decision "of the Supreme Court of Porto Rico and the District "Court of the United States shall be allowed and may be "taken to the Supreme Court of the United States in the "same manner and under the same regulations and in the "same cases as from the Supreme Courts of the Territories "of the United States; and such writs of error and appeals "shall be allowed in all cases where the Constitution of the "United States, or a treaty thereof, or an Act of Congress "is brought in question and the right claimed, thereunder "is denied; * * *."

No other legislation directly affecting the jurisdiction of the District Court of Porto Rico or the powers of this or of any other court to review the judgments and decrees of that court, has been had.

It will be noted that Section 35 provides that writs of error from the District Court of the United States for Porto Rico shall be allowed and may be taken to the Supreme Court of the United States in the same cases as from the Supreme Courts of the Territories. It is necessary, therefore, to determine whether or not an appeal could have been taken if this case had been before the supreme or highest courts of the Territories of the United States.

Appeals from cases in the highest courts in Arizona, Oklahoma and New Mexico are governed by Section 15 of the Judiciary Act of 1891 (26 Stat. at L., 826) which contains a general provision governing appeals from the Territories. Appeals from cases in the highest courts in Alaska, Hawaii and Indian Territory are governed for each territory by a special act. The Philippine Islands need not here be considered, as no provision for appeals was made for that

Territory until July 1, 1902. (Stat. at L., Vol. 32, part 2, Ch. 1369, p. 691.)

This Court would have no jurisdiction to review this case by writ of error if it came from the Territory of Alaska, for it is provided by the Act of June 6, 1900 (31 Stat. at L., Ch. 786, Sub. Ch., 51, pp. 321, 415) that writs of error may be taken from the District Court of that Territory directly to the Supreme Court in five classes of cases, enumerating the ones mentioned in Section 5 of the Act of March 3, 1891 (26 Stat. at L., 826), except that referring to the question of jurisdiction, in none of which the present case would be included, and provides that in all other cases where the amount involved or the value of the subject-matter exceeds $500.00 the appeal shall be to the Circuit Court of Appeals for the Ninth Circuit, and shall there be final (Sec. 505).

This Court would have no jurisdiction to review this case by writ of error if it came from the Territory of Hawaii, for the organic act of April 30, 1900, 31 Stat. at L., Ch. 339, Sec. 5, pp. 141, 158, gives no right of appeal to this Court unless it be inferred from the sentence of section 86 of that act which provides that the laws of the United States relating to appeals and writs of error, removal of causes and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii. This case would not be included in the class of cases for which appeals would thus be provided. *Exparte* Wilder's Steamship Company, 183 U. S., 545.

This Court would have no jurisdiction to review this case by writ of error if it came from the Court of Appeals of the Indian Territory which, under the decision in The Steamer Coquitlan, 163 U. S., 346, must be considered the Supreme Court of that Territory. The Act of March 3, 1895, (28 Stat.

at L., Ch. 145, p. 698) constituting the Court of Appeals of that Territory, provides, by Section 11, that appeals and writs of error may be taken from said Court to the Circuit Court of Appeals of the Eighth Judiciary Circuit in the same manner and under the same regulations as appeals are taken to the Supreme Court of the United States. Nothing is said about appeals to the Supreme Court of the United States and it may be argued that the act operates as a repeal, *pro tanto*, of the earlier acts such as section 13 of the Judiciary Act of 1891 providing for such appeals. In that case there would be no appeal from the Court of Appeals of the Territory to the Supreme Court of the United States (Harless *vs.* U. S., 880 F. R., 97). At any rate the present case could not be appealed to this Court.

If Congress referred to the Supreme Courts of these three Territories when it provided in Section 35 of the Foraker Act that writs of error from the final decisions of the District court of Porto Rico may be taken to the Supreme Court of the United States in the same cases as from the Supreme Courts of the territories of the United States, then certainly this court has no jurisdiction to review the present case. It may well be argued that Congress, when framing this law, had in mind the provisions relating to the Territories of Hawaii and Alaska and Indian Territory, which are in a situation similar to that of Porto Rico, being occupied as they are by a population foreign in race, customs, language and laws. Like Hawaii, Porto Rico can be reached only by sea, as is practically the case with Alaska.

Reference is made to the above provisions relating to appeals from Alaska, Hawaii and Indian Territory, in order to show that the provisions of section 35 of the Foraker Act are not free from uncertainty as to their intent.

However, it is assumed that Congress had reference to the general provision contained in section 15 of the Judi-

ciary Act of March 3, 1891 (26 Stat. at L., 826), entitled "An Act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the authority of the courts of the United States, and for other purposes." This section reads as follows:

"Sec. 15. That the circuit court of appeal in cases in "which the judgments of the circuit courts of appeal "are made final by this act shall have the same appellate "jurisdiction, by writ of error or appeal, to review the judg- "ments, orders and decrees of the supreme courts of the "several Territories, as by this act they may have to review "the judgments, orders and decrees of the district court "and circuit courts; and for that purpose the several Ter- "ritories shall, by orders of the Supreme Court, to be made "from time to time, be assigned to particular circuits."

The district of Porto Rico has not been added to any judicial circuit.

Appeals and writs of error from the District and Circuit Courts are provided for in sections 5 and 6 of that act. They read as follows:

"Section 5. That appeals or writs of error may be taken "from the district courts or from the existing circuit courts "direct to the Supreme Court in the following cases:

"In any case in which the jurisdiction of the court is in "issue; in such cases the question of jurisdiction alone shall "be certified to the Supreme Court from the court below for "decision.

"From the final sentances and decrees in prize causes.

"In cases of conviction of a capital or otherwise infamous "crime.

"In any case that involves the construction or applica- "tion of the Constitution of the United States.

"In any case in which the constitutionality of any law

"of the United States, or the validity or construction of "any treaty made under its authority, is drawn in question.

"In any case in which the constitution or law of a State "is claimed to be in contravention of the Constitution of "the United States.

"Nothing in this act shall effect the jurisdiction of the "Supreme Court in cases appealed from the highest court "of a State, nor the construction of the statute providing "for review of such cases."

"Section 6. That the circuit courts of appeals estab- "lished by this act shall exercise appellate jurisdiction to "review by appeal or by writ of error final decision in the "district court and the existing circuit courts in all cases "other than those provided for in the preceding section of "this act, unless otherwise provided by law, and the judg- "ments or decrees of the circuit courts of appeals shall be "final in all cases in which the jurisdiction is dependent "entirely upon the opposite parties to the suit or contro- "versy, being aliens and citizens of the United States or "citizens of different States; also in all cases arising under "the patent laws, under the revenue laws, and under the "criminal laws and in admiralty cases, excepting that in "every such subject within its appellate jurisdiction the "circuit court of appeals at any time may certify to the "Supreme Court of the United States any questions or "propositions of law concerning which it desires the instruc- "tion of that Court for its proper decision. And thereupon "the Supreme Court may either give its instruction on the "questions and propositions certified to it, which shall be "binding upon the circuit courts of appeals in such case, "or it may require that the whole record and cause may be "sent up to it for its consideration, and thereupon shall "decide the whole matter in controversy in the same man- "ner as if it had been brought there for review by writ of "error or appeal.

"And excepting also that in any such case as is herein-
" before made final in the circuit court of appeals it shall
" be competent for the Supreme Court to require by certi-
" orari or otherwise, any such case to be certified to the
" Supreme Court for its review and determination with the
" same power and authority in the case as if it had been
" carried by appeal or writ of error to the Supreme Court.

" In all cases not hereinbefore, in this section, made
" final there shall be of right an appeal or writ of error or
" review of the case by the Supreme Court of the United
" Sates where the matter in controversy shall exceed one
" thousand dollars besides costs. But no such appeal shall
" be taken or writ of error sued out unless within one year
" after the entry of the order, judgment, or decree sought to
" to be reviewed."

A careful perusal of this act makes it very plain that Congress intended to divide appealable questions into three broad classes:

I. One class of questions, the one set forth in Section 5, was deemed so important that an appeal was given directly from the Circuit and District Courts to the Supreme Court of the United States. It was fully understood that these appeals would go up, and should go up, to the Supreme Court eventually, and that an intermediary appeal would be merely a waste of time and expense.

II. In a second class of questions, set forth in Section 6 of the act, an appeal was allowed to the newly created Circuit Court of Appeals and the decrees and judgments of that Court were made final. The purpose of the act was to relieve the Supreme Court of the work which was crowding upon it more and more, and it was therefore provided that certain cases such as patent, revenue, admiralty and certain criminal cases, and cases in which the jurisdiction of the Circuit or District Court was dependent upon diver-

sity of citizenship, should be appealable no further than the Circuit Court of Appeals.

III. There remained a small class of cases, such for instance as cases arising under the copyright law, which could be appealed to the Circuit Court of Appeals and from there to the Supreme Court. This may be called the third class.

It will be noted that appeals in cases in which the jurisdiction of the United States courts depends upon a diversity of citizenship *only*, that is to say, cases *involving practically no Federal question whatsoever*, were by this act prevented from reaching the Supreme Court of the United States except by the extraordinary process of certiorari.

It is therefore evident that Congress did not intend to have cases involving no more than questions of general law go to the Supreme Court of the United States.

Sections 5 and 6 have received the consideration of this Court in a number of cases. In Borgmeyer *vs.* Idler, 159 U. S., 458, this Court said:

> " Where the jurisdiction of the United States Circuit
> " Court rests solely at the commencement of the suit
> " upon the ground of diverse citizenship, the judgment
> " of the Circuit Court of Appeals is final, although
> " other questions are subsequently raised."

To the same effect are:

John T. Voorhees *vs.* Noyes Mfg. Co., 151 U. S., 135;
Rouse *vs.* Letcher, 156 U. S., 47;
Carey *vs.* Houston & Texas Central Ry. Co., 161 U. S., 115;
Rouse *vs.* Hornsby, 161 U. S., 588:
Press Pub. Co., *vs.* Monroe, 164 U. S., 105;
Exparte Jones, 164 U. S., 691.

This brings us to the consideration of Section 15 of the Act relating to appeals from Territories. Here appeals were divided into two general classes.

One class embraces the cases involving questions referred to in Section 5 of the Act, that is, purely Federal questions, and such other cases with regard to which Section 6 of the Act provides that appeals shall not be final in the Court of Appeals. This class was made appealable directly to the Supreme Court.

The second class embraces all such cases in which if brought in a Circuit Court or District Court, the judgment of the Court of Appeals would be final. This class was made appealable to the Circuit Court of Appeals and no further.

In Shute *vs.* Keyser, 149 U. S., 649, it was decided that an appeal or writ of error lies to the Supreme Court from the judgments or decrees of the Supreme Courts of the Territories, except in cases where the judgments of the Circuit Courts of Appeal are made final.

It is evident that Congress, having in mind the purpose for which the Act was passed, namely, to relieve the Supreme Court of the tremendous burden of deciding all the appeals which would have come to it under the former acts, intended to provide that cases in the Territorial Courts involving only questions of general law, and patent, revenue, admiralty and criminal cases, should be appealable to the Circuit Court of Appeals and no further; while cases involving Federal questions, such as those enumerated in Section 5, and certain cases such as copyright cases, not within the exceptions of Section 6, were made appealable directly to the Supreme Court. In other words, the cases involved in the first and third classes in the constitutional courts above mentioned were thrown into one class, and made appealable directly to the Supreme Court, and all the cases involved in the second class above mentioned were put into another class and made appealable to the Circuit Court of Appeals and no further.

It is, therefore, urged that if the present case, which belongs to the second class, involving no Federal question, had been brought in one of the courts of Oklahoma, Arizona, or New Mexico an appeal would have had to go to the proper Circuit Court of Appeals, and that the Supreme Court would have had no jurisdiction except by certiorari.

It has been argued by counsel for plaintiff in error that the words of Section 6 of the Act which established the Circuit Courts of Appeals:

"In all cases in which the jurisdiction is dependent "entirely upon the opposite parties to the suit or contro- "versy, being aliens and citizens of the United States and "citizens of different States"

ought not to apply to appeals from the Territories because the jurisdiction of the courts there does not depend upon diversity of citizenship. At first blush this contention may seem to be justified, but it is submitted that a careful study of the entire Act discloses that Congress intended to make cases in which no Federal question is raised, that is to say cases involving only questions of general law, appealable to the Circuit Court of Appeals, and in no instance to the Supreme Court except by certiorari.

The proper method of construing an act of Congress is to try to ascertain the intent of Congress as evidenced by the entire act. "The whole and every part of the statute must be considered in fixing the meaning of the parts." (Co. Litt. 381 a.) Courts may also, "with perfect propriety, in construing a statute, recur to the history of the times when it was passed, and this is frequently necessary in order to ascertain the meaning of particular provisions in it." (United States *vs.* Union Pacific R. R. Co., 91 U. S., 72.)

Congress is compelled to clothe its intent in words, but words are but the vehicle of expressing the intent, and

should never be given a construction which violates such intent. "It is an established rule in the exposition of " statutes that the intention of the lawgiver is to be deduced " from a view of the whole and of every part of the statute " to be taken and compared together. The real intention " when actually ascertained, will always prevail over the " literal." (1 Kent's Com. 162, cited in People *vs.* Draper, " 15 N. Y., 532.)

The history of the efforts to relieve the calendar of the Supreme Court of its accumulation of cases threatening to swamp the court and to destroy its utility is too well known to need recounting here. When Congress finally grappled with the problem it solved it, as shown by the Act of 1891, by making a certain well defined class of cases appealable first to the new interappellate court before permitting their consideration by the Supreme Court, and making another certain well defined class of cases appealable to the new interappellate court and no further. The latter class of cases is set out in Section 6 of the Act of 1891, and comprises patent, revenue, admiralty and certain criminal cases, and practically all civil cases involving no Federal questions. The language of Section 6 is in the words of a portion of Article III, Section 2, of the Constitution, which enumerates the cases to which the judicial power of the United States shall extend. It was the best, and perhaps the only way in which Congress could express its intent to have these cases, and especially those involving no Federal questions, go no further than the new Circuit Court of Appeals. It is submitted that this intent is clear, plain and unmistakable.

McLish *vs.* Roff, 141 U. S., 661, 666:

" It is a matter of public history, and is manifest " on the face of that act, that its primary object was to " facilitate the prompt disposition off cases in the Su-

" preme Court and to relieve it of the enormous over
" burden of suits and cases resulting from the rapid
" growth of the country and the steady increase of its
" litigations. * * * It then provides for the
" distribution of the entire appellate jurisdiction of our
" national judicial system between the Supreme Court
" of the United States and the Circuit Court of
" Appeals, therein established, by designating the
" classes of cases in respect of which each of those two
" courts shall respectively have final jurisdiction."

By Section 15 of the Act of 1891 Congress has provided that in the same cases in which the judgment of the Circuit Court of Appeals is made final by this Act such court shall have final appellate jurisdiction in cases coming from the Territories. The intent is clear. Admiralty, patent, revenue and certain criminal cases again go to the Circuit Court of Appeals, as do also the cases involving questions of general law but not Federal questions. A certain concession is made to the Territories, in that certain appeals, those not referred to in Section 6 as made final in the Circuit Court of Appeals, such as appeals in copyright cases, go directly to the Supreme Court. This provision was made for the obvious reason that there were appellate courts in the Territories already, and that if the same rule were applied to this class of cases as was applied in the Constitutional courts, great hardship would result, because of the possibility of three appeals.

The words "cases in which the judgments of the circuit courts of appeals are made final by this Act," in Section 15, import into that section *all* such cases specified in Section 6. Counsel for plaintiff in error argues that the words of Section 6 "cases in which the jurisdiction is dependent " entirely upon the opposite parties to the suit or controversy " being aliens and citizens of the United States or citizens of

"different States" mean nothing when read in connection with Section 15, as the jurisdiction of territorial courts does not depend upon diversity of citizenship. But they must be held to mean something, rather than nothing, as they are clearly imported into Section 15 by the words above cited. This Court, and other courts, have always imported them into Section 15 when they have had occasion to consider this section. When the words of Section 6 are read in connection with Article III, Section 2, of the Constitution, it is evident that Congress intended by them to say "cases of general law involving no Federal question." Importing this reading of the words into Section 15 we find that the Supreme Court has been relieved by it of all "cases of general law involving no Federal question." *Thus, and thus only,* does the Judiciary Act of 1891 disclose a complete and harmonious system of appellate jurisdiction.

The following cases are the ones referred to as showing that the Courts have read the "diversity of citizenship" clause of Section 6 into Section 15.

The Circuit Court of Appeals for the Eighth Circuit in Union Central Life Insurance Company *vs.* Champlain, 116 F. R., 858, 859, in its opinion in a case coming to it by appeal from the Supreme Court of the Territory of Oklahoma, cited Sections 15 and 6 and said:

> "The jurisdiction in this case is not dependent upon
> " the opposite parties to the suit or controversy. *It*
> " *does not appear from the record that these parties are*
> " *aliens on the one side and citizens of the United States on*
> " *the other, or that they are citizens of different States.*
> " This is not a case arising under the patent laws,
> " the revenue laws, or the criminal laws, nor is it an
> " admirality case. *Hence* it does not fall within
> " the jurisdiction of this Court."

In Aztec Mining Company *vs.* Ripley, 53 F. R., 7, the Court of Appeals for the Eighth Circuit said:

> " The case at bar does not come within any one of " the classes wherein the judgment of this Court is " declared to be a finality. It is not a case in admir- " ality, nor does it arise under the criminal, revenue, " or patent laws of the United States, *nor is it a case* " *between aliens and citizens of the United States* or citi- " zens of different States, and therefore it does not " belong to any of the classes of cases in which " that Court is clothed with appellate jurisdiction."

This case was appealed to the Supreme Court of the United States. In its opinion reported in Aztec Mining Company *vs.* Ripley, 151 U. S., 179, this Court, speaking by Chief Justice Fuller, said:

> " By the 15th Section of the Judiciary Act of March " 3, 1891, the Circuit Courts of Appeals in cases in " which their judgments were made final by the Act " were empowered to exercise appellate jurisdiction over " the judgments, orders and decrees of the Supreme " Courts of the several Territories; but as this case is " not a case in admiralty, nor a case arising under the " criminal, revenue, or patent laws of the United States, " *nor a case between aliens and citizens of the United* " *States, or between citizens of different States, it does not* " *belong to either of the classes defined by Section 6 of that* " *Act*, as cases in which the judgments or decrees of the " Circuit Courts of Appeals should be final, and there- " fore the Circuit Court of Appeals for the Eighth Cir- " cuit properly declined to take jurisdiction."

In Folsom *vs.* U. S., 160 U. S., 121, this Court said:

> " The 15th Section confers appellate jurisdiction on " the Circuit Courts of Appeals to review the judgments " of the Supreme Courts of the Territories, but it is in " terms *the same appellate jurisdiction as conferred by the* " *6th Section* in respect of the judgments and decrees of

" District and Circuit Courts, *and this being so, is lim-*
" *ited to those cases in which, if decided by the District and*
"*Circuit Courts, the judgments of the Circuit Courts of*
" *Appeals would be final.*"

In Shute *vs.* Keyser, 149 U. S., 649, this Court said:

" An appeal or writ of error lies to this Court from
" the judgments or decrees of the Supreme Courts of
" the Territories except in cases where the judgment of
" the Circuit Courts of Appeals is made final."

The above citations show also that this Court has no jurisdiction on writ of error in cases in which the Court of Appeals has final jurisdiction. Therefore, the mere fact that there is no Circuit Court of Appeals competent to take jurisdiction of the present appeal would not give this Court jurisdiction.

We now come to the consideration of section 35 of the Foraker Act which defines the jurisdiction of the Supreme Court in writs of error and appeals coming from the courts of Porto Rico. For the sake of convenience, the section is here reprinted:

" Sec. 35. That writs of error and appeals from the final
" decisions of the Supreme Court of Porto Rico and the
" District Court of the United States shall be allowed and
" may be taken to the Supreme Court of the United States
" in the same manner and under the same regulations and
" in the same cases as from the Supreme Courts of the Terri-
" tories of the United States, and such writs of error and
" appeals shall be allowed in all cases where the Constitution
" of the United States, or a treaty thereof, or an act of Con-
" gress is brought in question and the right claimed there-
" under is denied; and the Supreme and District Courts of
" Porto Rico and the respective judges thereof may grant
" writs of habeas corpus in all cases in which the same are

" grantable by the judges of the District and Circuit Courts " of the United States. All such proceedings in the " Supreme Court of the United States shall be conducted in " the English language."

As has already been shown, it is not clear which Territories of the United States were referred to in this section, and it has been shown that Congress may possibly have intended to put Porto Rico into a class with the other Territories more similarly situated as regards distance from the United States by sea, or an alien population, or both, namely: Hawaii, Alaska, and Indian Territory. As this case could not have been appealed from Hawaii, Alaska, or Indian Territory, this Court would under this construction of this section have no jurisdiction to hear the present case. If, however, this clause is construed to mean that Congress intended to allow any writ of error or appeal which could have been taken from any court in any Territory, then this Court has no jurisdiction, as it has been shown that it would have had no jurisdiction in a similar case arising in Arizona, New Mexico, or Oklahoma.

It was undoubtedly the intent of Congress to provide a United States Court in Porto Rico for the convenience of American citizens and of aliens who would have to bring suit there. But it was also undoubtedly the intent of Congress not to burden the Supreme Court with cases like the present, involving no Federal question, in which this Court would be compelled to deal with a jurisprudence entirely unfamiliar and to decide cases which, arising as they do under Spanish law, would involve constructions of law and of contracts for which no cases ever decided in the United States could form a legal precedent. If cases like the present are to be decided by this Court, this Court would have to take judicial notice of foreign laws and decisions which, under ordinary circumstances, would

have to be proved, and which as a matter of fact are not accessible in this country. It certainly never was the intent of Congress to force this Court to read decisions of the Supreme Court in Madrid written in the Spanish language, and to construe the law of insurance, partnership, or of the construction of contracts in accordance with the Spanish or Porto Rican laws and decisions.

It is, therefore, respectfully submitted that this Court has no jurisdiction to determine the issues attempted to be raised by the writ of error.

If it be admitted for the sake of argument that the construction here placed upon Section 15 of the Judiciary Act of 1891 be incorrect, this Court has nevertheless no jurisdiction to hear this case. The case is substantially one brought by a citizen of the United States against an alien.

It is admitted that a citizen of Porto Rico is not a citizen of the United States, but on the other hand he is not an alien, so that although this case would, strictly speaking, not be one between a citizen of the United States and an alien, it would on the other hand, not be one between an alien and an alien.

[Porto Rico is not a foreign country. (De Lima *vs.* Bidwell, 182 U. S., 198, 200; Fourteen Diamond Rings *vs.* U. S., 183 U. S., 176, 179.) "An alien means nothing more than a citizen or subject of a foreign state." (Milne *vs.* Huber, 3 McLean, 212, 17 F. C., 405, 406).]

Such an anomalous position has not been provided for directly by the Judiciary Act of March 3, 1891, but light is shed upon the position of citizens of Porto Rico by the 7th section of the Foraker Act, which provides:

"That all inhabitants continuing to reside therein (Porto "Rico) who were Spanish subjects on the eleventh day of

" April, eighteen hundred and ninety-nine, and then re-
" sided in Porto Rico, and their children born subsequent
" thereto, shall be deemed and held to be citizens of Porto
" Rico, and as such entitled to the protection of the United
" States, except such as shall have elected to preserve
" their allegiance to the Crown of Spain on or before the
" eleventh day of April, nineteen hundred, in accordance
" with the provisions of the treaty of peace between the
" United States and Spain entered into on the eleventh day
" of April, eighteen hundred and ninety-nine; and they,
" together with such citizens of the United States as may
" reside in Porto Rico, shall constitute a body politic under
" the name of The People of Porto Rico, with governmental
" powers as hereinafter conferred, and with power to sue and
" be sued as such."

This provision clearly shows that Congress, by making the " People of Porto Rico " consist of citizens of the United States and citizens of Porto Rico, intended to put citizens of Porto Rico on a par with citizens of the United States. If, therefore, a citizen of Porto Rico must under the terms of the Judiciary Act of March 3, 1891, be placed into the category of an alien or the category of a citizen of the United States, he must be placed into the latter.

The District Court of Porto Rico is not a constitutional court, but a legislative one, and the Act of Congress creating it must be construed not with reference to the Constitutional provision relating to United States courts, but with reference to other legislative provisions of Congress, such as the 7th Section of the Foraker Act, above cited.

This case, if brought by a citizen against an alien in a United States Circuit Court would not be appealable to this Court, as the entire jurisdiction on appeal or writ of error would be vested in the Circuit Court of Appeals.

If therefore this case had been brought by a citizen against an alien in Arizona, this Court would have had no jurisdiction on appeal as such jurisdiction would have been vested in the Circuit Court of Appeals by Section 15 of the Judiciary Act of 1891 which provides that "the Circuit Court of Appeals *in cases* in which the judgments of the Circuit Court of Appeals are made final by this Act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several Territories as by this Act they may have to review the judgments, orders, and decrees of the District Court and Circuit Courts."

That this construction of the Judiciary Act of 1891 is not unfounded is shown by the cases cited on pages 14–16 of this brief and especially by the dictum of Chief Justice Fuller in Aztec Mining Co. *vs.* Ripley, 151 U. S., 179:

> " By the 15th Section of the Judiciary Act of March
> " 3, 1891, the Circuit Courts of Appeals in cases in
> " which their judgments were made final by the Act
> " were empowered to exercise appellate jurisdiction
> " over the judgments, orders and decrees of the Supreme
> " Courts of the several Territories; but as this case is
> " not a case in admiralty, nor a case arising under the
> " criminal, revenue, or patent laws of the United
> " States, *nor a case between aliens and citizens of the*
> " *United States, or between citizens of different States, it*
> " *does not belong to either of the classes defined by Section*
> " *6 of that Act,* as cases in which the judgments or
> " decrees of the Circuit Courts of Appeals should be
> " final, and therefore the Circuit Court of Appeals for
> " the Eighth Circuit properly declined to take juris-
> " diction."

Should this construction of the Judiciary Act of 1891 be adopted by this Court, the argument that this case was intended by Congress to be placed into the same category with those in which a citizen of the United States sues an

alien, is strengthened by showing to what absurdity a contrary view would lead.

If an alien sued a citizen of the United States in the District Court of Porto Rico, the citizen of the United States would have no appeal to the Supreme Court of the United States, whereas, if the same alien sued a citizen of Porto Rico, such citizen would have the right to appeal.

Congress could never have intended to deprive a United States citizen of his right to an appeal and in the same breath confer it upon a citizen of Porto Rico.

> Lau Ow Bew *vs.* U. S., 144 U. S., 47:
> " Nothing is better settled than that statutes should
> " receive a sensible construction, such as will effectuate
> " the legislative intention and, if possible, so as to avoid
> " an unjust or an absurd conclusion."

It is therefore respectfully submitted that this Court has no jurisdiction to determine the questions submitted by the writ of error.

SECOND POINT.

The Court did not err in its rulings with reference to the defense that the transfer of the personal property covered by the policy from Francisco Martin, the assured, to Martin Brothers voided the policy.

The plaintiff in error urges that the facts fail to show any right in the defendant in error to maintain an action to recover for the loss of the personal property, it having been established that the defendant in error, " Francisco Martin, to whom the policy had been originally issued, had surrendered the property to a firm or society of which he was only a sleeping or silent partner."

As regards the building, the testimony of the witness

Vasquez is to the effect that in 1898 it was the property of the testator (Rec., p. 31, fol. 51). No question is raised as to the right to recover for its loss.

With regard to the provisions and merchandise, the same witness testified (Rec., p. 31, fol. 51), that the father had an interest therein as a silent partner; further (Rec., p. 43, fol. 63), that he was a silent partner of the firm of Martin Bros. & Company, and that his interest in the partnership was $10,000; and further (Rec., p. 45, fol. 64) that in 1897 he had turned over his business to this firm; and further (Rec., p. 44, fol. 63) that the policy was continued in the father's name for the benefit of the firm. The insurance on the stock was £900, or about $4,400 (Policy, Rec., p. 32, fol. 52).

The question arises, therefore, whether the turning over of the business, or of the stock of goods, to the firm of which the insured was a silent partner, was such a transfer as came within the following condition of the policy, and thus made the policy void:

"This policy ceases to be in force as to any property "hereby insured which shall pass from the insured to "any other person otherwise than by due operation of "law, unless notice thereof be given to the company, "and the subsistence of the insurance in favor of such "other person be declared by a memorandum endorsed "thereon by, or on behalf of the company." (Policy, Rec., p. 34, fol. 54.)

By his 17th assignment, the plaintiff in error urges as error the refusal of the judge to instruct the jury "that if "the jury believes from the evidence that if at the time of "the fire, or prior thereto, the title to the stock of goods "which had been insured had passed out of Francisco Martin "and into another person, or other persons, the plaintiff "herein could not recover."

The law and decisions in the States of the Union on this point are very conflicting as a perusal of the books will show. This Court cannot therefore decide the question upon the authority of the decisions of any State or group of States. It becomes imperative to know the *lex loci contractus*, to wit, that of Porto Rico.

> "The general principle adopted by civilized nations
> "is that the nature, validity, and interpretation of
> "contracts are to be governed by the law of the coun-
> "try where the contracts are made, or are to be per-
> "formed." (Bank of the United States *vs.* Donnally,
> "8 Pet. 361, 372.)

No Spanish laws or decisions are submitted by counsel for plaintiff in error, so that no opportunity is given this Court to arrive at a correct conclusion on this important point. This Court cannot decide this question because it cannot be presumed to know the Spanish laws and decisions on the subject of partnership, fire insurance and construction of contracts.

For the sake of argument, however, this fatal defect will be waived for the present, and the question will be argued as a question of American law.

The reason for forbidding alienation of the insured property is twofold. The company desires to have the insured retain an interest in the policy because the Company has faith in the personal character of the insured, and the company also desires the insured to retain no less an interest in the goods than the amount of the insurance. As was said in Ayres *vs.* Hartford Ins. Co., 17 Iowa, 176:

> "The object of the Insurance Company by this
> "clause [forbidding transfer or change of title] is, that
> "the interest shall not change so that the assured shall
> "have a greater temptation or motive to burn the prop-
> "erty, or lose interest and watchfulness in guarding
> "and preserving it from destruction by fire."

In the present case the insured retained an interest of $10,000.00 in a business the only tangible assets of which were a stock of goods insured at $4,400. The reason for the rule thus failing, the rule itself fails.

It will be found that the majority of decisions hold that a transfer of insured goods to a partnership of which the insured is a member is not an alienation and does not void the policy.

Biddle on Insurance, Vol. 1, page 199:

> " But to avoid on the ground of alienation simple " the whole title must be parted with; for an alienation " of a part of the property, or a diminution in interest " of the insured will not avoid, the retention of a legal " or equitable title being sufficient interest."

The Washington Fire Insurance Company et al. *vs.* Kelley, 32 Md., 421, 434:

> "' If the property shall be sold or conveyed, or if " this policy shall be assigned, without the consent of " the company obtained in writing thereon, then this " policy shall be null and void.' * * *
>
> " The provision in the policy of the Washington " Fire Insurance Company against the sale or convey- " ance of the property insured, and against the assign- " ment of the policy without the consent of the insurers, " as it imposes a restriction upon the right of disposing " of the property, should be construed as any other " contract with like provision, with strictness, and noth- " ing less than the absolute sale or conveyance of the " property, with all the usual legal ingredients to con- " stitute the transaction as such, or similarly the com- " plete assignment of the policy, can be considered as " sufficient to avoid the policy on that account. Lazarus " *vs.* Commonwealth Ins. Co., 5 Pick., 76 to 82."

John Scanlon *vs.* The Union Fire Insurance Company of Baltimore, Md., 4 Bissell, 511, 512 (Circuit Court, Northern District of Illinois, March 3, 1869):

"Action upon insurance policy for $2,500, dated "September 17, 1867. At the time of the issuing of "the policy, the plaintiff was admitted to be the owner "of the property insured, but on the 11th day of Jan- "uary, 1868, and previous to the fire, he formed a "co-partnership with two other parties, and the property "insured was put in as partnership assets. The com- "pany claimed that this vitiated the whole policy un- "der the clause providing that, 'if the said property "shall be sold or conveyed, or if this policy shall be "assigned without the consent of the company ob- "tained in writing thereon, then and in every such case, "this policy shall be null and void.'

"Drummond, J., charged the jury as follows: "The question is whether there was, within the meaning "of this clause in the policy, a sale or conveyance of "the property, in such a way as to render it void.

"It is to be observed that the language of this con- "dition is general, 'that if the said property shall "be sold or conveyed,' etc. It is not that if the pro- "perty or any part of it, or any undivided interest in "it, shall be sold or conveyed, the policy shall be void; "it is not that if there is any change in the condition "of the property, or in the interest of the plaintiff, the "policy shall be void, but simply if the property shall "be sold or conveyed. The question is, whether the "true construction of this clause is not that, in order "to vitiate the policy it is essential that the whole of "the interest of the insured in the property shall be "sold or conveyed; and such, I think, is the true con- "struction of the condition. In order to avoid the "policy, he must sell the whole of his interest in the "property, and so long as he holds an interest in the "property the policy is binding. It was competent "for the insurers to declare that if a part of it were "sold, that should avoid the policy. It was also com-

" petent for them to declare that if there was any " change in the condition or title of the property, that " the policy would be void ; but that is not this condi- " tion. Therefore, I think the policy covers whatever " interest Scanlon owned in the property insured after " he entered into the articles of co-partnership, and at " the time of the loss. It is for you to determine what " that interest was."

Blackwell *vs.* Insurance Company, 48 Ohio State Reports, 533, 540:

" It is the policy of this court to strictly construe " those clauses in insurance policies which forfeit the " indemnity provided for the assured. West *et al. vs.* " The Citizens Insurance Company, 27 Ohio St., 1. " In this case, on page 10, Johnson, J., refers with " approval and in the following language to the views " on the subject contained on page 74 of May on Insur- " ance: ' Exceptions in a policy should be strictly con- " strued, and where there are two interpretations equal- " ly fair, that which gives the greater indemnity should " prevail.' And on page 13 (27 Ohio St.) the same " learned jurist says: 'Stipulations in a contract pro- " viding for disabilities or forfeitures, are to receive, " when the intent is doubtful, a strict construction " against those for whose benefit they are introduced.'

" Let us recur to the exact words of forfeiture as they " are set forth in the defendant's answer.

" 'If * * * said assured should sell or transfer " the property thereto insured, that said policy should " become null and void.' It was competent for the " policy to provide, expressly, that a sale of a part of " the property or of an interest therein should avoid " the policy; this they did not do. The absence of " specific provision to that effect when it could have " been so easily inserted, together with the rule before " referred to that conditions which defeat a policy " should be construed strictly against the forfeiture, " leads us to hold that a sale of the entire interest of " the property insured was necessary to avoid the " policy.

"In a strict legal sense, perhaps, where the one "engaged in business alone, takes a partner into his "business, or a firm receives a new member, or a mem- "ber goes out, the transaction results in the formation "of a new concern, accompanied by a sale or transfer "of all the property of the old concern to the new one; "but it is at least doubtful whether this strict legal "result is contemplated by the business world gener- "ally. That the parties in the case before us intended "the policy should be avoided in case the assured "received a partner into his business is uncertain; that "the plaintiff understood the transaction to be a sale of "an undivided half of the property and business to "Horman rather than a sale of the whole of it to a "firm composed of himself and Horman is quite prob- "able. It was competent for the parties to provide in "unambiguous terms that, if the assured received into "his business, without the consent of the insurers, a "partner, the policy should become void. This was "not done, and we think the principles already "announced require us to hold that the sale and trans- "fer resulting from the reception of a partner did not "avoid the policy.

"Notwithstanding the transaction the plaintiff re- "tained a substantial and insurable interest in the "property covered by the policy, while to avoid the "policy on account of the provision against alienation "it should have divested him of his entire interest."

Cowan *vs.* The Iowa State Insurance Company, 40 Iowa, 551, 552:

"'When any property insured in this company shall "'be alienated by sale or transfer, the policy thereon "'shall be void.' * * *

"It is then alleged that the plaintiff violated this "condition by the sale, alienation and transfer of all "the insured property to 'the firm of Cowan & Haskins, "a co-partnership composed of the plaintiff, Samuel "Cowan and Omar Haskins,' and that the goods in-

" sured were, at the time of the loss, the property of " that firm.

" A demurrer to this count of the petition, (*sic.*) on the " ground that it does not show an alienation or " transfer of all the property, but shows that plaintiff " still retained an insurable interest therein, which " was covered by the policy, was sustained. * * *

" Nothing less than a transfer of the property insured " whereby plaintiff would part with all his interest " therein, would operate to defeat the policy under the " condition against alienation, pleaded by defendant. " As long as plaintiff retained an insurable interest in " the property the policy attached thereto and pro- " tected plaintiff to the extent of his interest. May on " Insurance, pp. 463, 381, pp. 303, 278; Hitchcock *vs.* " N. W. Ins. Co., 26 N. Y., 68; West Branch Ins. Co. *vs.* " Helfenstein, 40 Pa. St., 289; Sherman *vs.* Niagara " Fire Ins. Co., 2 Sweeney, 470; Fernandey *vs.* Great " Western Ins. Co., 3 Robertson, 457; Hoffman *vs.* " Place, 32 N. Y., 405."

" From the judgment of the court upon the demurer, " the defendant appeals. The rule is based upon " sound reason and the true construction of the clause " in question, which neither in its language nor spirit, " is intended to deprive the insured of the right to dis- " pose of a part of the property by sale or otherwise. " This would operate as a restraint upon trade and the " free sale and transfer of property to which business " men who must enter into these contracts of insur- " ance, would never submit. It is not admitted for " the protection of the underwriters, and we have never " heard of a construction giving such an effect to a " condition against alienation. The condition of the " policy before us declares that the instrument shall be " void upon the alienation of the property insured, not " upon the alienation of a part of it.

" In our judgment the same reasons will support " the view that the transfer of an interest in the prop- " erty to a partner, which is shown by the answer, " will also fail under the condition in question, to

" defeat plaintiff's right to recover. As long as the " insured owns the property or a part of it, or an in- " terest in it that is insurable, the policy during its " life covers such a part or interest. As the condition " cannot be construed into a contract against a sale " of a part of the property, neither can it be re- " garded as an undertaking on the part of the assured " not to dispose of an interest in it. These views are " based upon the consideration that no increase of risk " is wrought by the sale or transfer of a part of, or an " interest in, the property insured.

" It is well settled that a partner has insurable in- " terest in the property of the firm.

" The transfer pleaded was by the plaintiff to a firm " of which he was one of the partners. So far as plain- " tiff is concerned, whatever interest he retained in the " goods never passed out of him. As the transfer is " stated in the answer, plaintiff passed the title of the " property from himself to another and himself. It is " true, that to a certain extent, a co-partnership is con- " sidered a person separate from the partners who may " have transactions, and make contracts with it as " such. But it is true that a partner, by the sale of " the property to the firm, actually parts with the in- " terest which, as a partner, he actually holds in the " firm property. The answer, therefore, fails to show " such an alienation as will defeat the policy and bar " the right of recovery by plaintiff."

There is no reason in view of the above cases, and of the reasonableness of the doctrine announced therein, why this Court should follow the decision of the court of New York in the case referred to by counsel for plaintiff in error, Germania Fire Ins. Co. *vs.* Home Ins. Co., 144 N. Y., 195. Moreover, the condition in this policy was much stricter and fuller than the one in the policy in suit. " Or if the property be sold or transfersed, or any change take place in the title or possession * * * this policy shall be void " (p. 197).

So also the condition in the second case cited by counsel for plaintiff in error, Drennen *vs.* London Assurance Corp., 20 F. R., 657, is much stricter than the condition of the present policy. "If the property insured be sold or "transferred, or any change takes place in the title, except "by succession, by reason of the death of the assured, "whether by legal or judicial process, or voluntary transfer "or conveyance, this policy shall be void."

The authority of these two cases is therefore not entitled to much weight in the decision of the present question.

The only case which counsel for defendant in error has been able to find construing a condition phrased in the words of the present one is the Scotch case of Peter Forbes & Co. *vs.* Border Counties Fire Office, Cases decided in the Court of Sessions, 3d series, vol. 11, p. 278. The policy of fire insurance involved in that case contained a condition exactly like condition 5 of the present policy except that for "due operation of law" in line 3 thereof (Rec., p. 34, fol. 54), the words "will or operation of law" are found. The state of facts in this case is rather an involved one, but the decision shows clearly that as long as the real party in interest retains a real interest in the property, the policy is not voided by any transfer to or from a firm of which the insured may formally or informally be a member. The following citation from the opinion of the Lord Justice gives the gist of the case:

> "It does not appear that the property which was in-"sured had passed to any other person than the original "insurer in the sense of that clause, and I shall very "shortly go over the facts and state the grounds on "which I arrive at that opinion."
>
> Peter Forbes & Co., a firm of manufacturing chemists consisting of Peter Forbes, Joseph Townsend and Readman, obtained in the name of the firm a policy of fire insurance on their works. Townsend was the

owner of the property but had signed a declaration of trust stating that the property was held by him as trustee for the firm. Then on July 15, 1871, the policy was taken out. The title to the subjects stood in the name of Mr. Townsend.

"Further it is proved that Mr. Townsend had advanced not merely the amount which he originally "undertook to advance, but that he was at the date of "this insurance, in advance to the extent of something "like £20,000. Mr. Readman had made a partial advance, "I think £500, and Mr. Forbes had put nothing into the "concern. Therefore at the time of the insurance I cannot doubt that Mr. Townsend had substantial interest "in the concern, and it does not occur to me that if a "fire had taken place at that time anyone would have "drawn the insurance money except Mr. Townsend. "His advances were not replaced; he was proprietor "of the subjects, holding them, no doubt, first, for the "company, but I rather think he would have been "entitled to hold the whole concern until these advances had been replaced. The fire took place in "December, 1871, and the defenders hold that they "are not bound to pay under their obligation because "there had been an agreement which in fact they "had nothing whatever to do with, and of which "they had no cognizance necessarily, by which there "was a new arrangement of the firm of Peter Forbes "& Co. If that had been fully carried out I should "not have thought that it made any difference upon "the question that we are now discussing, because my "opinion is that Mr. Townsend himself was substantially the insured. I have no idea that the mere "change of firm, or even the change of interest of the "partners in the firm, would bring that clause into "operation upon any construction of it. Certainly if "the firm had been dissolved altogether, so that it no "longer existed as an operative *persona*, the interests of "the partners in the concern would subsist, and they "would substantially be individually the insured, or "the firm subsisting at the winding up would be

" entitled to recover the amount insured. In the " present case, however, I should have doubted whether " the transfer was complete before the fire under any " circumstances. There is an agreement no doubt " added in November under which Mr. Forbes under- " takes to transfer and make over to the second party " the business carried on by the first party under the " firm of Peter Forbes & Co., and the whole assets and " good will thereof, and his right and interest therein. " He undertakes to do that, and in consideration of " the obligations undertaken by him, the second party " (that is to say, Mr. Townsend) has made payment to " the first party the sum of £400 sterling, and he under- " takes to relieve the first party of all the debts and " liabilities contracted by the first party under the " firm of Peter Forbes & Co. I rather think from what " we see that that still remains to be done. The obliga- " tions amount to over £20,000, and Mr. Townsend, " before he could have the benefit of this agreement, " or demand his transfer, must show that he is imple- " mented with part of the agreement, and clear the " business of the debts that were upon it. The matter " is not complete. The fire takes place in December " and before this has fully come into operation. No " doubt there was a " Gazette " notice that the firm " was dissolved, but the firm would still continue until " the conditions of this agreement had been fully im- " plemented. *Or putting that aside altogether*, and *sup- " posing that this had been an operative agreement from " the first, my opinion would still remain that Mr. Townsend " was substantially the insured, that he continues to have " the substantial interest in the policy; and that the prop- " erty which was therefore insured has not been in sub- " stance passed from the insured to any other party, and " that therefore the clause does not apply.*"

It is respectfully submitted, therefore, that the judge was correct in stating that there was no evidence before the jury to the effect that there was any alienation of the insured property.

Nor was the refusal of the judge to order the jury to return a separate verdict a reversible error. If the judge was correct in his ruling on the question of alienation, then no separate verdict was necessary. Moreover, the defendant did not request a charge for a separate verdict until after the jury had returned its verdict. (Rec., p. 84, fol. 113.) It was then too late to ask for a separate verdict. (Pacific Express Co. *vs.* Malin, 132 U. S., 531.) Moreover, "the fact that an action involves several different elements of recovery does not require a separate assessment of damages as to each." Encycl. Pleading & Practice, Vol. 22, page 912. Texas & P. Ry. Co. *vs.* Padgett, 36 S. W. Rep., 300.

It is respectfully submitted that the 9th and 17th assignments in error are not well founded.

THIRD POINT.

There was no error in the rulings of the Court with reference to the ground of defence that the policy was void for the reason that the fire occurred during an invasion, riot, etc.

The facts as shown by the record and especially that part which is reprinted by plaintiff in error in his brief on pages 33 to 56, are as follows:

The fire occurred on the night of August 19 to 20, 1898. (Rec., p. 42, fol. 62.)

The defendant below offered evidence to show that there was a riot at Coto Laurel on August 19th to 20th. This evidence was contradicted flatly by the testimony of the plaintiff's witnesses Lopez and Montenegro. (Rec., pp. 71, 72.)

The language of the policy in so far as it relates to the question of invasion, riot, etc., reads as follows:

"This policy does not cover * * * loss or damage "by fire happening during the existence of any invasion,

" foreign enemy, rebellion, insurrection, riot, civil commo-
" tion, military or usurped power, or martial law within the
" country or locality in which the property is situated, unless
" proof be made to the satisfaction of the directors that such
" loss or damage was not occasioned by or connected with,
" but occurred from a cause or causes independent of the
" existence of such invasion, foreign enemy, rebellion, insur-
" rection, riot, civil commotion, military or usurped power,
" or martial law." (Policy, Rec., p. 33, fol. 53.)

The judge charged the jury, after referring to this provision, as follows:

" The defense mainly relied upon here is that this loss
" occurred during an invasion, riot, civil commotion, mili-
" tary or usurped power or martial law. A fair construction
" of that condition in the opinion of the Court is that that
" must, in order to excuse this company from liability in
" case of loss of property by fire, that that invasion by foreign
" enemy, rebellion, insurrection, riot, civil commotion, mili-
" tary or usurped power or martial law, must have been
" occurring within the section of the country where this loss
" occurred, or within the locality, and within such a radius
" of country where the loss occurred that danger arose to
" the property by reason of the existence of that rebellion,
" invasion, insurrection, civil commotion, military or
" usurped power, or martial law. And I further tell you,
" gentlemen, that if you believe from the evidence that this
" destruction of this property did not occur from any of these
" causes, and occurred from a cause independent of the ex-
" istence of any foreign enemy, rebellion, insurrection, riot,
" civil commotion, military or usurped power or martial law,
" then you should find so far as this defense is concerned
" for the plaintiff in damages whatever you think may have
" been his loss. This is a reasonable construction, as the
" Court thinks, of this and these conditions of the policy.
" * * * If you believe from the testimony that this
" loss occurred during invasion, rebellion, riot, civil com-
" motion, and other states of case as set out in the policy,
" existing in this locality where this store and real estate
" was located, or in that section of the country, and that

" it occurred by reason of the existence of that state of case,
" why, then, if you believe it did occur from that state of
" case in that section where the loss occurred, and by reason
" of it, you would find for the defendant."

Counsel for plaintiff in error, on page 61 of his brief, suggests that the defendant below might well have been entitled to a ruling upon the state of the proof, that a state of invasion existed at the place where the property was. This point was not raised in the court below, is not covered by an exception or an assignment in error, and cannot therefore be considered by this Court. It will not be discussed herein. (Young *vs.* Amy, 171 U. S., 179.)

The charge made by the Court was a perfectly proper one. The defendant, however, attempted to object to it for the reason that it did not properly state the law of the case in view of the language of the policy above quoted, which, according to the defendant below, was intended to cast the burden of proof that the fire was not caused by the riot upon the plaintiff. The plaintiff in error has placed an erroneous construction upon this section of the policy. The policy provides merely that loss by fire happening during the existence of any invasion, riot, etc., within the country or locality in which the property insured is situated shall not be paid by the company unless proof be made to the satisfaction of the directors that such loss or damage was not connected with this invasion or riot, but occurred from a cause or causes independent of the same. The construction of this provision should not offer much difficulty. In case a loss by fire occur during the existence of an invasion or riot, the Board of Directors *may call for proof* that such loss was not occasioned by the invasion, and if such proof be not furnished, or, if furnished, be not reasonably satisfactory, no action on the policy may be maintained. The condition was inserted merely for the protection of the

stockholders of the company, in that it placed a check upon the Board of Directors by providing that they should not pay certain claims without first calling for satisfactory proof that the loss was not due to certain casualties which were not insured against.

In Braunstein *vs.* Accidental Death Insurance Co., 1 Best & Smith, 783, the action was on a life insurance policy which contained the following condition:

> " Before payment of the sum insured by any policy " proof satisfactory to the directors should be furnished " of the death or deaths." * * *

Blackburn, J., concurring, said:

> " I quite admit that parties may make what they " please a condition precedent, but it must be shown " that they so intended. Here the stipulation is in the " language of one party, the company, and '*verba fortius accipiuntur contra proferentem*': no doubt they " might have stipulated that no money should be " payable under a policy unless the directors obtained " any evidence they chose to ask, but it would require " very distinct language, and much stronger than any " used here, to show that the parties so intended. " * * * But I think the plaintiff's counsel is right in " saying that that stipulation was only introduced with " reference to the duties of the directors towards the " company, *i. e.*, that the directors were not to settle a " claim against the company until they had got proper " evidence". (p. 799)

It is not denied that the directors of the company, through the local agent, might properly have stated to the insured that as the fire had occurred during a riot proof should be adduced by the insured to show that the riot was not responsible for the fire. But the directors not only did *not* call for such proof, and thereby waived their right under this con-

dition of the policy, but they wrote a letter to the insured, the substance of which was as follows:

" That as these events were produced by a riot, they were " not compelled to pay." (Rec., p. 42, fol. 62.)

As the company had already stated its conclusion that the fire was caused by the riot, there was nothing further for the insured to do but to bring an action and to force the company to prove the statement that the fire was caused by the riot.

An analogous question was involved in the case of Baillie & Co. *vs.* Assurance Co., 49 La. An., 658, in which the Court said, on page 661:

> " A stipulation for an appraisement should have for " its sole object the ascertainment of the amount of the " loss. The stipulation ceases to have force where the " insurer disputes to the insured the rights to recover " anything at all under the policy. We think the con- " clusion reasonable; in the presence of an absolute " refusal to pay anything, the assured should have the " right to file a suit and maintain an action for the " loss. That a denial of all accountability leaves " nothing to arbitrate. On the refusal of the defend- " ant to pay, and in the presence of defendant's neglect " actively to avail itself of the stipulation in regard to " the appraisal, the plaintiff might well infer that " nothing was left for him to do save to sue, and have " any right he had passed upon by the courts."

See also La Societe etc. *vs.* Wm. B. Morris & Co., 24 La. An., 347; Monteleone *vs.* Insurance Co., 47 La. An., 1563; National Union *vs.* Thomas, 10 App. D. C., 277.

German Ins. Co. *vs.* Frederick, 58 F. R., 144:

> " A denial of all liability by an insurance company " before the expiration of the time for making proof of " loss is a waiver of the condition requiring such " proof."

Such an action was then brought, and the company reiterated this statement in its fourth plea:

"4. For a fourth and further plea defendant says that "plaintiff ought not to have his said action because the "alleged loss or damage *was caused by fire*, happening dur- "ing the existence of an invasion, foreign enemy, rebellion, "insurrection, riot, civil commotion, military or usurped "power and martial law, within Porto Rico and in the "locality in which the property alleged to have been in- "sured was situated, and that no proof was made to the sat- "isfaction of the directors that such loss or damage as "alleged was not occasioned by or connected with, but "occurred from a cause or causes independent of the exist- "ence of such invasion, foreign enemy, rebellion, insur- "rection, riot, civil commotion, military or usurped power, "or martial law."

The letter of the company and its plea throw a great light upon the construction of this condition. Had the company construed the condition as it is construed by counsel for plaintiff in error in his brief, it would not have written that it rejected the claim because the fire had been caused by the riot, but it would have written that as the fire had occurred during a riot, the company did not feel compelled to pay unless the insured produced the proper proofs.

It is ridiculous to assert in view of these facts that the policy intended to cast the burden of proof, that the fire was not caused by the riot, upon the insured in an action at law. The company drew the contract and must be supposed to have been more familiar with its provisions than the insured. The construction which was placed on the contract by the company, as is shown by this letter, is therefore controlling in this case. Should there be any doubt as to the meaning of the condition it must be resolved against the company and in favor of the insured. Certainly the company may

not in this Court juggle away the evident meaning and intent of the condition and make it mean something that it never said, namely, that the burden of proof in an action at law should be upon the insured to show that the fire had not been caused by the riot.

"It is the duty of the insured to clothe the contract in language so plain and clear that the insured cannot be mistaken or misled as to the burdens or duties thereby imposed upon him. Having the power to impose conditions, and being the party who draws the contract, he must see to it that the conditions are plain, easily understood, and free from ambiguity. * * * Failing to employ a clear and distinct form of expression, the benefit of all doubts will be resolved in favor of the assured. The courts will not permit the assured to be misled, or cheated, where there is any sort of justification, from the language used, for the interpretation placed by him upon the instrument. A contract drawn by one party, who makes his own terms, and imposes his own conditions, will not be tolerated as a snare to the unwary, and if the words employed, of themselves, or in connection with other language used in the instrument, or any rights to the subject-matter to which they relate, are susceptible of the interpretation given them by the assured, although in fact intended otherwise by the insurer, the policy will be construed in favor of the assured." Wood on Fire Insurance, Vol. I, page 161, Second Edition, citing Hoffman *vs.* Ætna Insurance Co., 32 N. Y., 405; Reynolds *vs.* Commerce Ins. Co., 47 N. Y., 597, and many other cases.

In Insurance Company *vs.* Eggleston, 96 U. S., 572, 577, Mr. Justice Bradley, speaking for the Court, said:

"We have recently, in the case of Insurance Co. *vs.* Norton, 96 U. S., 234, shown that forfeitures are not favored by the law, and that courts are always prompt to seize hold of any circumstances that indicate an elec-

" tion to waive a forfeiture or any agreement to do so " on which the party has relied and acted. Any agree- " ment, declaration or course of action, on the part of " the insurance company, which leads the party insured " honestly to believe that by conforming thereto a for- " feiture of his policy will not be incurred, followed by " due conformity on his part, will and ought to estop the " company from insisting upon the forfeiture, though it " might be claimed under the express letter of the con- " tract. The company is thereby estopped from en- " forcing the forfeiture." Cited in Hartford Life Ins. Co. *vs.* Unsell, 144 U. S., 439, 449.

It is not understood that counsel for plaintiff in error in his brief intends to urge that the Judge was mistaken in limiting the jury to the consideration of the testimony of invasion at or near the place of the fire and at the time of the fire.

Assuming, merely for the sake of argument, that the construction placed upon the condition by the counsel for the plaintiff in error is the correct one, and that the Court should have instructed the jury that if it found that there was an invasion or riot in the locality in which the fire occurred it must find for the defendant because the policy places upon the plaintiff the burden of proving that the fire was not caused by said riot or invasion, it is respectfully submitted that this point was not properly raised at the trial and cannot be made use of by the defendant on appeal.

It is a well-known principle of the law relating to the conduct of trials, that the "attention of the judge should be called to the objectionable charge in order that he may have an opportunity to make proper corrections. Exceptions to instructions should specifically point out the alleged error. A party excepting must make his exception so specific that the matter relied on as error will be apparent

to his adversary and to the primary court (Ayrault *vs.* Pacific Bank, 47 N. Y., 576), for his adversary having his attention directed to the special matter relied on as erroneous, has the right and privilege of waiving such matter, rather than by insisting on it, incur the hazard and delay of an appeal to a superior tribunal. The Court, having its attention specially directed to the erroneous matter, might be satisfied of the error into which it had fallen through inadvertence, and could voluntarily correct it, by a reversal of its rulings, and thus protect the party excepting from all injury." (Encycl. Pleading and Practice, Vol. 8, page 262, Tit. Exceptions and Objections.)

It will be seen by an inspection of pages 82 and 83 of the record that the objection to the charge now urged in this Court was never made plain to the Judge below. At the beginning of folio 110 the attorney for the defendant excepted to the portion of the charge which limited the consideration of invasion and riot to the section of the country or the locality where the fire occurred. The Judge overruled this exception (Rec., p. 83, top), and properly so, as a riot in other parts of the island could have had no bearing upon the fire in Coto Laurel. Thereupon the following occurred:

" Mr. Dexter: Defendant also wishes to except to that " part of the charge of the Court to the effect that 'if you " ' believe that the loss did not occur from these causes.' " The objection being that defendant asks that the charge " instruct the jury that they shall find for the defendant if " they find that the loss occurred during the existence of " any of these conditions—

" The Court: This cause or any of them.

" Mr. Dexter: Defendant asks that the charge be modi- " fied to this effect: 'If you believe that the loss occurred " ' during the existence of invasion, foreign enemy, rebellion, " insurrection, riot, civil commotion, military or usurped

" power or martial law, then you will find for the defendant.'
" In other words, not making that the cause, but if it is
" shown that those circumstances existed that then—
" The Court: The objection you make is, if that is modi-
" fied as you wish—but it does not fix any locality or sec-
" tion of the country.
" Mr. Dexter: Your Honor has already passed on that
" in this prior objection, but I refer now to the other feature
" as to whether the fire should prove to be the result of any
" of these conditions mentioned which would be the cause.
" We object to making—
" The Court: I have told the jury that if the fire arose
" by reason of any of these causes existing in that section or
" locality of the country.
" Mr. Dexter: That is the part defendant excepts to.
" The Court: You may take an exception to that. I un-
" derstand you are claiming, for instance, if the Germans
" had invaded San Juan and got into San Juan, and if this
" property in this place had been destroyed by a boy drop-
" ping a match, that the company would be released. The
" Court has not that view.
" Mr. Dexter: We also except to that part of the charge
" as to the proof of the loss.
" The Court: Well, save an exception."

This citation from the record shows that the defendant desired to raise the question that the charge was incorrect in so far as it did not instruct the jury to find for the defendant in case it found the fact of invasion or riot. However, he never made this point clear to the Court. The Court had its mind upon the limitation of the competent proof of invasion to the locality or section of the country in which the fire occurred, but the attorney for defendant *by refusing to limit his request for charge to such locality* not only did not give the Court the opportunity of taking its mind off the point of locality of the fire and putting it on the point which defendant's attorney tried to raise, but actually requested improper instructions. "The request should specifically

call to the attention of the Court the point sought to be made, in order to render its refusal available on appeal." (Encycl. Pleading & Practice, Vol. 8, page 271.) This Court in Beaver *vs.* Taylor, 93 U. S., 46, 55, has said: "One object of an exception is to call the attention of the "circuit judge to the precise point as to which it is supposed "he has erred, that he may then and there consider it and "give new and different instructions to the jury, if in his "judgment it should be proper to do so."

Instead of doing this, the defendant asked that the charge be modified to this effect: "If you believe that the loss "occurred during the existence of an invasion, foreign "enemy, rebellion, insurrection, riot, civil commotion, mili- "tary or usurped power or martial law, then you will find "for the defendant."

The Court objected to this modification as it did not fix any locality or section of the country, but defendant's attorney did not make the necessary correction, thus misleading the Court to such a degree that the Court never understood his point, but did understand that he was claiming, "For "instance, if the Germans had invaded San Juan and had "got into San Juan, and if this property in this place had "been destroyed by a boy dropping a match, that the com- "pany would be released."

In other words, the Court never saw the point which defendant intended to raise by his exception. This was certainly not the fault of the Court because the defendant had requested that for the alleged improper charge a modified charge be substituted, which modified charge, however, would have been incorrect because it was not limited to the locality or section of the country where the loss occurred.

"Where a party relies upon a general exception for "refusing to charge, the request must be perfectly

" proper as an entirety ; if it embraces any idea which " ought not to be presented, it destroys the exception " although one part of the proposition if presented " separately might be proper." Encycl. Pleading & " Practice, Vol. 8, page 271.

" When the requested instructions would have been " correct with the addition of a single qualifying word, " the omission of that word in the request was held fatal " to the exceptions."

Marshall *vs.* Oaks, 70 Md., 308, 312, citing Stowe *vs.* Heywood, 7 Allan, 118.

By requesting the Court to make an improper charge in place of a charge alleged by the defendant to be improper, the defendant lost his right to profit by this alleged error of the Court. Certainly it is not fair to the defendant in error that he should be compelled to submit to another wearisome trial merely because the defendant was not willing to limit his request to a charge which was proper in other respects, although reminded by the Court of the defect in his proposed charge. He might just as well have added another request for a charge similar to the one which he did make, but in which the locality of the invasion was limited as the Court thought it should be limited.

It is not shown in the brief of plaintiff in error how the statement of the judge referred to in the 16th assignment of error was calculated to injure the defendant, nor is it understood how this could have been possible; moreover the statement was not excepted to at the trial, and cannot therefore be considered here. (Stanton *vs.* Embry, 93 U. S., 548.) At any rate, the statement of the judge was a proper one as it was a mere *reductio ad absurdum* of defendant's argument.

It is submitted that the 14th, 15th, and 16th assignments in error are not well founded.

FOURTH POINT.

The writ of error should be dismissed for lack of jurisdiction with costs to the defendant in error, or the judgment should be affirmed with costs to the defendant in error.

Respectfully submitted,

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Of Counsel for Defendant in Error.